EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Compensation for the costs of caring for a child whose disability was not detected during prenatal screening: retrospective application of the law is contrary to the Convention

In today's **Chamber** judgment[1] in the case of N.M. and Others v. France (application no. 66328/14) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.

The case concerns the dismissal, by the administrative courts, of the arguments submitted by the parents in their claim for compensation for the special costs arising from their child's disability. This disability had not been detected at the time of the prenatal diagnosis. Legislative provisions arising from the Law of 4 March 2002, and codified under Article L. 114-5 of the Social Action and Family Code (CASF) – which prohibited the inclusion of these costs when calculating the prejudice for which compensation was payable, and which had entered into force after the child's birth but prior to the parents' legal action for compensation – were applied to the dispute.

This case follows on from the cases of *Maurice* and *Draon* against France (Draon v. France [GC], no. 1513/03, and Maurice v. France [GC], no. 11810/03).

The Court held, firstly, that the applicants could legitimately have expected to be able to obtain compensation for the prejudice they had sustained, corresponding to the costs of caring for their disabled child, as soon as that damage occurred, namely from the child's birth, and that they had therefore had a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. It then noted that, under the Constitutional Council's decision no. 2010-2 QPC, all of the transitional provisions requiring the retrospective application of Article L. 114-5 of the CASF had been repealed. Although the abolition of these transitional provisions immediately left scope for application of the rules of ordinary law governing application of the law over time, the Court found a divergence between the interpretation adopted by the *Conseil d'État* and that adopted by the Court of Cassation regarding the possibility of applying Article L. 114-5 of the CASF to events which arose prior to the entry into force of the Law of 4 March 2002 (that is, 7 March 2002). Although in its judgment of 15 December 2011, the Court of Cassation had ruled out the application of Article L. 114-5 of the CASF to events which had occurred prior to 7 March 2002, irrespective of the date on which the action for compensation was brought, the *Conseil d'Etat* had settled the dispute in line with its decision of 13 May 2011 which, for its part, had maintained a certain retrospective scope to this provision.

The Court concluded that it was unable to find that the legality of the interference resulting from the *Conseil d'État*'s application of Article L. 114-5 of the CASF in its decision of 31 March 2014 could be derived from the settled and stabilised case-law of the domestic courts. In the Court's view, the retrospective interference with the applicants' possessions could not therefore be regarded as having been "provided for by law" within the meaning of Article 1 of Protocol No. 1.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Principal facts

The applicants, Ms N.M., Mr M and their son A, are French nationals who were born in 1972, 1971 and 2001 respectively and live in Sainte Anne de Guadeloupe.

In May 2001, while pregnant, Ms N.M. asked the S. Hospital to carry out a thorough prenatal diagnosis. No abnormality was detected.

On 30 December 2001 A. was born, a boy suffering from a series of malformations referred to as "VATERL syndrome", with an imperforate anus, malformations affecting his kidneys, a vertebra and one of his upper limbs, and facial asymmetry.

On 16 September 2002 the parents, who considered that there had been an error in prenatal diagnosis, asked that an expert be appointed; this was done, and the court-appointed expert issued a report concluding that there had been an error in interpreting the ultrasound scans undergone by the applicant during her pregnancy. Following this report, the applicants brought an action against the Hospital, alleging negligence, before the Amiens Administrative Court and claimed compensation for several heads of damage.

Two actions for compensation, relating to the damage sustained by the parents and the expenses linked to the disability, raised, among other points, the issue of the application over time of the provisions of section 1(1) of the Law of 4 March 2002, codified in Article L. 114-5 of the Social Action and Family Code (CASF).

In a judgment of 30 December 2008, the Amiens Administrative Court held that the above-mentioned provisions, which restricted the grounds of claims that the parents could rely on, were not to be applied to the dispute. Noting the negligence committed in monitoring the pregnancy, the court held that the Hospital was liable and ordered it to make good all the damage sustained both by the parents and by their child. It set the loss of opportunity, suffered by the first two applicants, to prevent the birth of the child at 100%.

On 9 March 2009, the Hospital appealed against this judgment and the applicants lodged a cross-appeal on 13 July 2009.

On 11 June 2010, the Constitutional Council issued QPC decision no. 2010-2, repealing section 2(2)(ii) of the Law of 11 February 2005.

In a judgment of 16 November 2010 ruling on the appeals, the Douai Administrative Court of Appeal refused, in turn, to apply the provisions of Article L. 114-5 of the CASF, based on the Constitutional Council's decision no. 2010-2 QPC (concerning a request for a preliminary ruling on constitutionality) and the repeal of these provisions with effect from 12 June 2010. The administrative court confirmed that the negligence on the part of the S. Hospital had been the direct cause of the damage sustained by the first two applicants.

Two appeals on points of law were lodged by the S. Hospital and by the applicants.

Following its decision of 13 May 2011 (Judicial Assembly, Lazare), the *Conseil d'État*, in a decision of 31 March 2014, held that Article L. 114-5 of the CASF was applicable to the dispute, as the applicants had not brought compensation proceedings until after 7 March 2002, the date of entry into force of the Law from which the provisions of this Article derive; it set aside the decision of the administrative court of appeal on the grounds that it had erred in law. The *Conseil d'État* held that, as the applicants had not brought proceedings before 7 March 2002, the date on which the new provisions entered into force, they did not have on that date the right to a claim for compensation, which would have in turn constituted a possession within the meaning of Article 1 of Protocol No. 1 to the Convention.

Further ruling on the Hospital's liability, the *Conseil d'État* ruled out any compensation for the damage sustained by the child himself. On the other hand, it held that there was an undeniable

direct causal link between the damage sustained by the parents and the negligence committed by the hospital when carrying out the ultrasound scan; in so far as this had prevented them from learning of the unborn child's serious and incurable condition, it had deprived them of the possibility of terminating the pregnancy, as provided for under the relevant legislation.

After noting that "the provisions of Article L. 114-5 of the CASF prohibit the inclusion of the special costs arising from their child's disability, not detected during pregnancy, in the sum payable to the parents in compensation", the *Conseil d'État* concluded that "the arguments of Mr M. and Ms M. to the effect that their son's disability-related expenses should be borne by the [S. Hospital] cannot ... be accepted". With regard to the other heads of damage, the compensation to be paid was increased to EUR 80,000 (EUR 40,000 each) in respect of the non-pecuniary damage sustained by the parents themselves and the disruption to their lives.

Complaints, procedure and composition of the Court

Relying on Articles 6 § 1 (right to a fair hearing), 8 (right to respect for family life) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 1 (protection of property) thereto, the applicants complained about the retrospective application of the law.

The application was lodged with the European Court of Human Rights on 29 September 2014.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Lado **Chanturia** (Georgia),
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Article 1 of Protocol No. 1

The first two applicants contested the application by the *Conseil d'État*, in its judgment of 31 March 2014, of the 1st and 3rd paragraphs of Article L. 114-5 of the CASF. They argued that the application of these provisions, which had led to the refusal, as a matter of principle, to award compensation for the disability-related expenses arising from their son's disability, had infringed their right to the peaceful enjoyment of their possessions, in breach of Article 1 of Protocol No. 1.

The Court noted that neither the hospital nor the Government disputed that the erroneous diagnosis carried out during the prenatal ultrasound scans had amounted to negligence, causing damage. The only point in issue was the date of the event which gave rise to the claim.

The Court considered that, in view of the principles of French ordinary law and the settled case-law with regard to liability, according to which a claim for compensation came into being as soon as the damage giving rise to the claim had occurred, the applicants could legitimately have expected to be able to obtain compensation for the prejudice they had sustained, corresponding to the costs of caring for their disabled child, as soon as that damage occurred, namely when the child was born. It followed that the applicants had a claim which they could legitimately have expected to be determined in accordance with the ordinary law of liability for negligence, given that this was

damage which had occurred prior to the enactment of the law complained of. They had therefore had a “possession” within the meaning of the first sentence of Article 1 of Protocol No. 1.

In the present case, the Court noted that that it was not disputed that the application to the applicants’ action of the provisions of Article L. 114-5 of the CASF, which excluded in principle compensation for the costs of caring for their son’s disability, constituted an interference amounting to a deprivation of property. The Court had therefore to determine whether the interference complained of could be justified under Article 1 of Protocol No. 1.

The Court noted, firstly, that under the terms of the Constitutional Council's decision no. 2010-2 QPC, all of the transitional provisions laying down the retrospective application of Article L. 114-5 of the CASF had been repealed. The abolition of these transitional provisions immediately left scope for application of the rules of ordinary law governing the previous application of the law. It followed that, given the repeal of all of the transitional provisions and in the absence of any other legislative provision expressly providing for it, Article L. 114-5 of the CASF could not be applied to facts which arose prior to the entry into force of the Law of 4 March 2002, irrespective of the date on which the proceedings were brought.

The Court noted, secondly, the divergence between the interpretation adopted by the *Conseil d’État* and that adopted by the Court of Cassation. In its judgment of 15 December 2011, the Court of Cassation ruled out the application of Article L. 114-5 of the CASF to events which had occurred prior to 7 March 2002, the date on which the Law of 4 March 2002 came into force, irrespective of the date on which the action for compensation was brought. The Court of Cassation had subsequently upheld this approach.

In these circumstances, the Court was unable to find that the legality of the interference resulting from the application, by the *Conseil d’État*’s decision of 31 March 2014, of Article L. 114-5 of the CASF, could be derived from the settled and stabilised case-law of the domestic courts. The Court concluded that the retrospective interference with the applicants’ possessions could not be regarded as having been "provided for by law" within the meaning of Article 1 of Protocol No. 1.

There had been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the first two applicants.

Article 14 taken together with Article 1 of Protocol No. 1

Given its finding of a violation concerning the first two applicants’ right to the peaceful enjoyment of their possessions, the Court did not consider it necessary to examine the applicants’ complaint under Article 14 of the Convention taken together with Article 1 of Protocol No. 1.

Just satisfaction (Article 41)

As regards the sum to be awarded to the applicants for any pecuniary or non-pecuniary damage resulting from the violation found, the Court held that the question of the application of Article 41 was not ready for decision, and accordingly reserved it.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.